

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GIOVANNI T. ZUNINO

Claimant

V.

RESERS FINE FOODS, INC.

Respondent

AND

SENTRY CASUALTY COMPANY

Insurance Carrier

Docket No. 1,064,700

ORDER

Claimant, through Roger D. Fincher, of Topeka, requested review of Administrative Law Judge Rebecca Sanders' January 7, 2015 Award. Joseph C. McMillan, of Overland Park, appeared for respondent and insurance carrier (respondent). The Board heard oral argument on May 12, 2015.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties stipulated the potential compensability of claimant's heart palpitations was not at issue. The parties also stipulated the Board may consider the *AMA Guides*¹ (hereafter *Guides*) if necessary.

ISSUES

Claimant sustained an electrical shock on February 19, 2013. Of relevance, claimant alleged cervical spine and left shoulder injuries. The judge concluded claimant had an accident, but did not prove his injuries were caused by the accident or that the accident was the prevailing factor in causing his injuries. Claimant requests the Award be reversed, arguing he proved compensable injuries resulting in a 10% whole body impairment. Claimant also argues the judge erred in denying future medical treatment.

Respondent maintains the Award should be affirmed. Respondent argues claimant did not injure his neck or left shoulder, and even if he did, he failed to prove permanent impairment of function.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

The issues are:

1. Did claimant sustain personal injuries by accident arising out of and in the course of his employment?
2. What is the nature and extent of claimant's disability, if any?
3. Is claimant entitled to unauthorized and future medical treatment?

FINDINGS OF FACT

Claimant, 40 years old, worked as a sanitation supervisor for respondent for about six years. On February 19, 2013, claimant investigated a complaint about a large machine that was not working properly. Claimant testified he hit the "E stop"² button, but the machine did not stop. Claimant testified when he tried to turn off the machine at the main power supply, there was a booming sound and a bright light inside the machine and he felt an electrical shock. While moving to the right to remove his left arm and hand, he lost his footing. Claimant testified, "I did like 180 degree spin and I hit the framework in two areas of my head and around my shoulder."³ Claimant also explained that after the electrical shock, his left hand was in front of him and he lost his footing when he tried to yank his hand off and he fell into a V-shaped framework inside the machine.

Claimant testified that following the accident, first aid responders were worried about the rhythm of his heart and transported him to the St. Francis emergency room. He told emergency room personnel he hit his head right above the ear and believed he may have also hit his right knee. Claimant complained of swelling above his ear, in addition to a dull pain at the base of his head. He believed he made no mention of numbness or tingling in his extremities because at the time, his whole body was "tremmering."⁴

Claimant testified he started having problems in his left shoulder and neck within two or three days after the accident. Claimant believed he injured his left shoulder while trying to grab on to something, but could not recall the mechanics of the accident. He was referred to Donald Mead, M.D. Claimant testified he told Dr. Mead about problems involving his head, neck and left shoulder and requested a CT scan or MRI.

² R.H. Trans. at 8.

³ *Id.*

⁴ *Id.* at 20.

Claimant testified he was next referred to Sumer Dhir, M.D., a cardiologist, who performed a stress test and EKG. According to claimant, Dr. Dhir indicated testing showed “inappropriate sinus tachycardia.”⁵ Claimant testified Dr. Dhir initially told him it was “highly likely” the electricity that went through his hand disrupted the electrical component of his heart and then later stated he was not “too sure” and recommended claimant be evaluated by another physician.⁶ As noted on page one, claimant’s heart condition is not at issue.

On September 5, 2013, at his attorney’s request, claimant saw Daniel Zimmerman, M.D., who is board certified in internal medicine and as an independent medical examiner. Claimant reported sustaining an electrical shock which caused him to suddenly move to the right and hit his head against the machine frame. Claimant further reported the electrical current penetrated through his left thumb and up his left arm toward his neck and shoulder. Claimant also told Dr. Zimmerman he hit the back of his head, neck and left shoulder on the machine. After examining claimant, Dr. Zimmerman diagnosed him with chronic cervical paraspinous myofascitis and impingement syndrome.

Dr. Zimmerman assigned claimant a 5% whole person impairment for his cervical spine using table 73 on page 110 of the *Guides*. Dr. Zimmerman assigned claimant an 8% impairment pursuant to the *Guides* for left shoulder impingement syndrome based on range of motion deficits and weakness. The 8% impairment rating converts to a 5% whole person impairment. In accordance with the Combined Values Chart in the *Guides*, Dr. Zimmerman assigned claimant a 10% whole person impairment.

Dr. Zimmerman imposed permanent restrictions of lifting 50 pounds on an occasional basis and 25 pounds on a frequent basis, avoid hyperflexion and hyperextension of the cervical spine or holding the cervical spine in captive positions for extended periods of time and avoid work activity at shoulder height or above on the left side.

Dr. Zimmerman testified the prevailing factor for claimant’s chronic cervical paraspinous myofascitis and impingement syndrome affecting the left shoulder was the February 19, 2013 accident.⁷ Dr. Zimmerman testified the primary cause of shoulder impingement is inflammation, which is commonly associated with lifting and repetitively reaching overhead. Dr. Zimmerman opined claimant’s shoulder inflammation resulted from muscles tenseness associated with the electrocution and the passage of the current. Dr. Zimmerman indicated claimant will require future nonsteroidal anti-inflammatory medication and injections.

⁵ *Id.* at 23.

⁶ *Id.* at 24.

⁷ Zimmerman Depo. at 9-10.

Dr. Zimmerman acknowledged his review of claimant's medical records contained no mention of neck or left shoulder complaints. He further acknowledged his report held the first mention of claimant having neck or left shoulder complaints.

On February 21, 2014, at respondent's request, claimant saw Steven Hendler, M.D., who is board certified in physical medicine and rehabilitation. Dr. Hendler reviewed medical records, took a history from claimant and performed a physical examination. Claimant reported an electrical shock which caused him to fall and hit the machinery framework with his head, knees and, he believed, his left hip, but no other body parts. Claimant further reported when he raised his arm, he experienced a tingling feeling in his neck on both sides which radiated distally to his forearms. Claimant indicated the symptoms always occurred bilaterally, but with varying intensity such that his symptoms were sometimes worse on one side than the other. Claimant indicated when he put his arms down, he got a brief tingling/cold feeling which then went away. Claimant also reported pain in the left groin area when climbing stairs and occasional right knee pain.⁸

Dr. Hendler's physical examination showed claimant's neck had full range of motion with mild diffuse tenderness without spasm. Claimant's left shoulder had normal range of motion without crepitus. Claimant did not have specific tenderness of his left shoulder. He had normal upper extremity strength and tone, in addition to equal and bilateral reflexes.

Dr. Hendler diagnosed claimant with neck pain, shoulder pain and palpitations. Hendler opined the neck and shoulder complaints were not attributable to the work event because they were not mentioned in the medical records until the time of Dr. Zimmerman's report. Dr. Hendler deferred any causation opinion regarding the palpitations to a cardiologist. In addressing impairment, Dr. Hendler stated, "Absent the issue of palpitations, there is no permanent partial impairment identified as a result of the work injury of February 19, 2013."⁹ Dr. Hendler opined claimant suffered no permanent impairment for two reasons:

The primary issue relates to the fact that there were no symptoms noted until seven months after the injury. A secondary issue would be that even if there were symptoms noted, there were no objective findings that would qualify as meeting the criteria in the AMA Guides to the Evaluation of Permanent Impairment Fourth Edition to suggest or to qualify for an impairment above zero.¹⁰

⁸ Hendler Depo., Ex. 2 at 1.

⁹ *Id.*, Ex. 2 at 4.

¹⁰ *Id.* at 12.

Dr. Hendler testified if claimant was still complaining of neck and shoulder pain, his only recommendation would be over-the-counter medication and possibly ice or moist heat. Dr. Hendler testified, "This gentleman has a normal neurologic exam, normal motion, and minimal amount of tenderness. Those are patients who don't tend to respond well or need more aggressive intervention."¹¹

Claimant testified he still has problems with his neck and left shoulder. He has tightness in his left shoulder with tingling radiating down to his left hand. He experiences palpitations once or twice a week and headaches about every other day with occasional dizziness. While claimant acknowledged having headaches before the accident, he testified the headaches are much more intense. He has not had physical therapy for his neck and shoulder. He takes over-the-counter medication, like Tylenol and ibuprofen, to control the pain. Claimant acknowledged he is under no medical direction to take such medication and takes it at his own discretion. Claimant denied any prior problems involving his heart, neck, shoulder or back.

Claimant continued to work for respondent for about a month after the accident. While working for respondent, claimant also worked weekends at Pepsi Cola/Frito Lay. Claimant testified after leaving his employment with respondent, he worked approximately six weeks at Berry Plastics in the manufacturing line. He left this employment after experiencing pain in his arms. He also worked at Target Distribution Center for six to eight weeks loading trucks and using a hand pallet jack, which caused an increase in his shoulder and neck pain. He left this position because he could no longer physically perform the job. He currently works for Pepsi Cola/Frito Lay as a weekend resource. This job requires a lot of walking. At times, he picks up boxes containing bags of chips.

In the January 7, 2015 Award, the judge stated in part:

This case is somewhat unusual in that this is an accident involving an electrical shock. The mechanics of the accident as to what Claimant hit or might have injured due to the electrical shock are not clear. Claimant is claiming that he has permanent impairment to his left shoulder and cervical spine. In some versions of the accident, Claimant hit his left shoulder. However there are no versions where Claimant hit or landed in such a way that it would directly impact his cervical spine. The injuries that were rated [involving] the cervical spine and the left shoulder are based on an impairment due to inflammation. The medical evidence as to how an electrical shock caused inflammation is not persuasive. There is merely a statement that there is inflammation and no explanation as to how this accident caused the inflammation other than a blanket statement it was due to electrical shock. The record is devoid of an explanation of how an electrical shock lead to inflammation in the left shoulder and the cervical spine. If in fact the electrical shock caused the inflammation then why is it not the entire left upper extremity including the hand

¹¹ *Id.* at 17.

impaired if that is where the electrical shock entered the body. It is not enough to just present evidence that I did not have these injuries before this accident so the accident must have caused them and that the injuries are due to inflammation without any more explanation as to how an electrical shock causes inflammation. It is found and concluded that Claimant had an accident but it has not been established by the preponderance of the evidence that Claimant has any injuries that were caused by the accident or that the accident was the prevailing factor for . . . the injuries that Claimant alleges he sustained.

K.S.A. 44-510h as amended May 15, 2011 provides a presumption the employer's liability for medical expenses terminates upon maximum medical improvement. The presumption may be overcome with medical evidence that it is probably more true than not additional medical treatment will be required after maximum medical improvement. Additional "medical treatment" does not include home exercise programs or over-the-counter medications.¹²

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. Claimant has the burden of proving compensability based on a preponderance of the evidence. The trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-510h(e) states:

It is presumed that the employer's obligation to provide [medical treatment] shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2012 Supp. 44-555c(a) states, in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

¹² ALJ Award at 7-8.

Board review of a judge's order is de novo on the record.¹³ The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.¹⁴ The Board, on de novo review, makes its own factual findings.¹⁵

"A claimant's testimony alone is sufficient evidence of his own physical condition."¹⁶

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."¹⁷

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.¹⁸ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.¹⁹

ANALYSIS

Did claimant sustain personal injuries by accident arising out of and in the course of his employment?

Claimant had an accident. However, claimant did not injure his neck or left shoulder. The testifying medical experts agreed there was no mention of any such complaints in the medical records until claimant's expert's report was prepared, over six and one-half months after the accident. Similarly, there is no evidence claimant received any medical treatment for his neck or left shoulder. As previously noted, the compensability of claimant's heart condition is not at issue.

This finding renders moot claimant's other issues.

¹³ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

¹⁴ See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

¹⁵ See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

¹⁶ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000).

¹⁷ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

¹⁸ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

¹⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

CONCLUSIONS

Having carefully reviewed the entire evidentiary file contained herein, the Board concludes claimant did not prove by a preponderance of the credible evidence that he injured his neck or left shoulder.

AWARD

WHEREFORE, the Board affirms the January 7, 2015 Award.

IT IS SO ORDERED.

Dated this _____ day of May, 2015.

BOARD MEMBER

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